

VAT Newsletter

Hot topics and issues in indirect taxation

April 2019

NEWS FROM THE CJEU

Sale and lease-back: impact on input tax

CJEU, ruling of 27 March 2019 – case C-201/18 – Mydibel

The Court of Justice of the European Union (CJEU) has concluded that a building does not require an input tax correction if it is part of a sale and lease-back transaction that is not subject to VAT.

The case

The Belgian company Mydibel owns several buildings. Mydibel fully deducted the taxes shown on the invoices for construction, remodeling or renovation measures as input tax.

On 1 October 2009, Mydibel executed sale and lease-back transactions with two financial institutions in order to increase its liquidity. These transactions consisted of Mydibel's related and simultaneous granting of a hereditary leasehold to the two financial institutions and real estate leasing by these two financial institutions to Mydibel. The transactions were not subject to VAT and pertained to these buildings. The issue at dispute is whether Mydibel is

obliged to make an input tax correction.

Ruling

A correction of the input tax deduction is required in particular if the factors taken into account when determining the amount of the input tax deduction have changed after submission of the VAT declaration (see Art. 184, 185 of the VAT Directive).

A subsequent correction of the input tax deduction is only required if the building that is initially used for taxable revenues which give rise to the input tax deduction is later used for tax-exempt transactions that are excluded from an input tax deduction. This is not the case here. In this case, the buildings were continually and permanently used by Mydibel to carry out its professional activities. In addition, although the sale and lease-back resulted in the payment of direct remuneration to Mydibel, the company committed itself to paying quarterly rent to the relevant financial institutions over a period of 15 years, the total amount of which corresponds with the total amount of this remuneration plus interest.

Content

News from the CJEU

[Sale and lease-back: impact on input tax](#)

[Substantive conditions for a zero-rated export](#)

[Place of provision of services in relation to seminars](#)

News from the BFH

[Correction of inaccurate application of law in the case of property developers](#)

In brief

[Driving school lessons subject to VAT according to Union law](#)

[Input VAT deduction of an operational holding](#)

Consequently, Mydibel clearly continued to use the revenues generated for the construction, remodeling or renovation of the buildings in question for its taxable output transactions. This finding demonstrates that the factors taken into account when determining the amount of the input tax deduction did not change.

A correction pursuant to the specific rules governing capital goods is also not applicable. In accordance with Art. 187 of the VAT Directive, properties are subject to an adjustment period as defined by the member states of 5-20 years. Pursuant to Art. 188, para. 1 of the VAT Directive, when supplying a capital item within the adjustment period, it must be treated as if it had been continued to be used for the taxpayer's economic activity until the end of the adjustment period. In this case, the sale and lease-back transactions are purely financial transactions that serve to increase Mydibel's liquidity. Furthermore, the buildings remained the property of Mydibel and were continually and permanently used by the company for its taxable revenues. These circumstances illustrate that these revenues represent a single transaction that cannot qualify as a tax-exempt supply of goods which triggers an input tax correction as defined by Art. 188 of the VAT Directive.

Please note:

Depending on the specific structure of the contract and how it is actually implemented, a sale and lease-back transaction may consist of two separate transactions, namely a delivery and a return as defined by Art. 3, para. 1 of the German VAT Law (UStG) or a lease-back. However, there may also be a

single transaction by the lessor in the form of a tax-exempt loan (Art. 4 (8) (a) UStG) – as in the current CJEU ruling.

Another possibility, according to the German Ministry of Finance (BMF) guidance of 3 February 2017, is a taxable service supplied by the lessor. For this to apply, the primary focus of the sale and lease-back transaction must be to allow the lessee to enjoy favourable accounting treatment. In addition, the lessor must have provided a loan for the predominant share of the financing of the acquisition by the lessee (see [VAT Newsletter March 2017](#)).

Substantive conditions for a zero-rated export
CJEU, ruling of 28 March 2019 – case C-275/18 – Milan Vinš

The Court of Justice of the European Union (CJEU) has confirmed its principles on the zero rating (VAT exemption with entitlement of input VAT deduction) of exports. If it is certain that the goods have actually left the territory of the Union, the zero rating may not also be made dependent on the items being placed under the export customs procedure.

The case

From 2012 to 2014, Mr. Vinš supplied 400 to 500 small items of military memorabilia every month. These items were supplied by post from the Czech Republic to places outside the EU. He did not submit any VAT returns for these goods. He was of the opinion that the supplies in question were zero-rated as they concerned items which were intended for export. Carriage out of the EU could be documented by means of a confirmation from the customs office or using other

means of evidence, including proof of postage.

The zero rating was denied on the grounds that Mr. Vinš had not proven that these goods were placed under the export customs procedure. To prevent tax evasion, the Czech legislature had established the condition of placing the items concerned under a customs procedure.

Ruling

A zero-rated export delivery exists if the right, such as that of an owner to dispose of the item, is transferred to the purchaser, the supplier proves that the items were sent or transported to a place outside of the EU, and the item, as a result of this shipment or transport, has physically left the sovereign territory of the Union.

These conditions are fulfilled in the case at hand. First, it is certain that the items in question were exported out of the territory of the EU by Mr. Vinš by post. In particular, Mr. Vinš can prove the actual carriage out of the EU by means of documents from the postal service. In addition, Union law does not stipulate a condition like that of the Czech regulation by which items intended for export must be placed under an export customs procedure. Such a regulation is also disproportionate. In the case at hand, there is also no case of abuse which would rule out a zero rating.

The fact that Mr. Vinš did not place the items under the relevant customs procedures by means of a customs declaration in accordance with Art. 59 (1) and Art. 161 (2) of the Customs Code is not conclusive. A placement of this type, whether before or after the export, constitutes merely a formal

obligation, which, moreover, does not fall under the common VAT system but rather under the customs system.

Please note:

At the same time, the CJEU states in its ruling that the breach of a formal provision can lead to a denial of the VAT exemption if it hinders conclusive evidence that the substantive requirements have been fulfilled. It is true, as the Czech government claims here, that not placing items intended for export under the corresponding customs procedure could frequently lead to it being more difficult or even impossible for the tax authorities to check if the goods have actually left the territory of the EU. The specific proof of carriage out of the EU by means of proof of postages, however, was not called into question.

Place of provision of services in relation to seminars

CJEU, ruling of 13 March 2019 – case C-647/17 – Srf konsulterna

This CJEU ruling concerns a submission from Sweden on the question of where services in relation to seminars shall be taxed.

The case

The case at hand concerns the Swedish-resident company, Srf, which offers training courses on accounting questions. Among others, Srf offers seminars for taxable persons, which take place over five days, with a one-day break outside of Sweden in another Member State. Whether these courses are subject to Swedish VAT in accordance with Art. 44 of the VAT Directive or, in accordance with Art. 53 of the VAT Directive are not taxable in Sweden, is disputed.

According to Art. 53 of the VAT Directive, the place of supply of a service provided to a taxable person relating to the right of admission for events such as teaching on location, is the location at which these events actually take place. According to Art. 44 of the VAT Directive, the place of supply of a service to a taxable person, who is trading as such, is the place in which that taxable person has their place of business. However, if these services are provided at a fixed establishment located elsewhere, that location is the significant one.

Ruling

The CJEU ruled that Art. 44 of the VAT Directive does not take precedence over Art. 53 of the VAT Directive. According to Art. 32 of Implementing Regulation (EU) No. 282/2011, services in line with Art. 53 of the VAT Directive relating to the right of admission to events in the area of education and science, such as conferences and seminars, include services whose essential characteristics are the granting of the right of admission to an event in exchange for a ticket or payment.

The courses in this case, which require the physical presence of the taxable persons, fall into the category of events in the area of teaching in line with Art. 32 of the Implementing Regulation, according to the CJEU. The right of admission to the seminars, which is granted to the taxable person in return for payment, necessarily contains the possibility of attending and participating in those seminars. This participation is thus closely connected to the right of admission to the seminars. Therefore, for the purposes of making use of Art. 53 of the VAT Directive, no distinction can be drawn between the right to enter

a place and the right to participate in a particular teaching course.

From the point of view of usage, the determination of the place in which courses are held – like in the case in question – must take place on the basis of Art. 53 of the VAT Directive. They are therefore subject to VAT in the place in which they actually take place, i.e. in the Member States in which the courses are held. This also applies if it leads to a higher administrative burden for the taxable persons. The fact that registration and payment for these courses took place in advance is irrelevant for the application of Art. 53 of the VAT Directive.

Please note:

It remains to be seen whether and how the tax authorities will react to this CJEU ruling. Art. 53 of the VAT Directive was implemented in German law through § 3a (3) no. 5 German VAT Law (UStG). In the tax authorities' view, seminars fall under rights of admission in accordance with § 3a (3) no. 5 UStG, if they are generally open to the public (see Section 3a.6 (13) sent. 3 no. 3 VAT Application Decree). This may be based on the idea that non-public events are tailored to the specific wishes of a company and that consequently, the focus is on the advisory aspect rather than a teaching service. This does not, however, correspond to the CJEU's evaluation approach.

NEWS FROM THE BFH

Correction of inaccurate application of law in the case of property developers

BFH, ruling of 23 January 2019, XI R 21/17

This ruling from the German Federal Tax Court (BFH) deals with the correction of an inaccurate application of law in cases relating to property developers.

The case

A self-employed master painter rents out apartments which he is the sole owner of. In this respect, he carries out VAT-exempt transactions in line with § 4 no. 12 UStG. In the years under dispute, 2009 to 2011, he had various maintenance work carried out for his rented properties.

The trader initially assumed – in line with the tax authorities – that, as a result of his activities as a self-employed painter, he was also considered to be liable for VAT for the maintenance work in accordance with § 13b UStG, if he obtained the tradesmen’s services for his rental company, because the services arising from his occupation as a self-employed painter amounted to more than 10% of his entire revenue. In the VAT returns for the years under dispute he therefore also declared services obtained for his rental company as such, for which he, in accordance with § 13b UStG owed VAT.

It is disputed whether, with reference to the BFH ruling of 22 August 2013, the VAT for 2009 to 2011 should be reduced by the amounts which were incorrectly paid in accordance with § 13b UStG for supplies in connection with rental transactions.

Ruling

The BFH affirms this. If the property developer, as a result of an erroneous assumption paid tax on construction services he has purchased as the recipient of the supply in accordance with § 13b UStG, he can claim the cancellation of this unlawful taxation irrespective of fulfilling a demand for additional charges made to him by the supplying trader or the tax authorities offering the possibility of an offset.

Neither the direct or analogous application of § 17 UStG nor the principle of good faith stand in the way of the changes that the painter wished to make to the contested assessment notices.

The “windfall profits” which the tax authorities fear, could not, according to the BFH, happen in this context: If a property developer’s claim against the recipient of a supply for the payment of VAT exists, the tax authorities can amend the VAT assessment notice in accordance with § 27 (19) UStG.

If the construction company and the recipient of the supply, in the case of a construction contract concluded and carried out before the issuance of the BFH ruling of 22 August 2013, agreed on the assumption that the property developer was liable for VAT, and if the property developer paid the VAT arising on the services provided by the construction company, as a result of a supplementary interpretation of contracts, is entitled to payment of the VAT amount. This is the case if the property developer demands a refund of the VAT and a risk therefore arises for the construction company that they will have to pay the VAT as the person liable for VAT due to the

application of § 27 (19) UStG. This entitlement is transferable. The tax authorities must assume a potential transfer.

Please note:

In its ruling of 23 February 2017, V R 16/16, V R 24/16 (see [VAT Newsletter April 2017](#)), the BFH’s Senate V explicitly left the question of whether a property developer is entitled to back payments of VAT according to the principles of supplementary interpretation of contracts open. In this respect, the ruling establishes legal clarity.

IN BRIEF

Driving school lessons subject to VAT according to Union law

CJEU, ruling of 14 March 2019 – case C-449/17 – A & G Fahrschul-Akademie

This CJEU ruling concerns the VAT treatment of driving school services following a submission from the BFH. It relates to the question of whether driving school services, contrary to national law, should be exempt from VAT according to Union law (Art. 132 (1) (i) or (j) of the VAT Directive). The CJEU rejected this.

For the purposes of VAT rules, the term school and university teaching refers generally to an integrated system for the transmission of knowledge and skills in relation to a broad and diverse spectrum of material as well as the consolidation and development of this knowledge and these skills by the pupils and students according to their individual progress and specialization in the different levels of this system.

It is true that the teaching in a driving school is not merely a leisure pursuit, as the possession of relevant driver permits can, among other things, allow one to meet professional requirements. Driving instruction in a driving school – if it even relates to different skills of a practical and theoretical nature – remains nonetheless a specialized education which in itself does not equal the transfer, consolidation and development of knowledge and skills in relation to a broad and diverse spectrum of material which characterizes school and university teaching.

abuse of the legal possibilities of organization in line with § 42 German Tax Code. The company set out various non-tax reasons as to why it had decided to provide its shareholder contribution to the associated companies in the form of benefits in kind. In particular, the motives of making use of economies of scale by centralizing purchasing, keeping its own costings confidential, and increasing the difficulty for claims of liability in the case of bankruptcy, are weighty arguments which, viewed in isolation, justify the method of organization chosen. An appeal has been lodged against the ruling.

Input VAT deduction of an operational holding

Lower Tax Court of Niedersachsen, ruling of 19 April 2018, 5 K 285/16; BFH ref.: XI R 22/18

The ruling concerns a company which provides accounting and management services to an associated company for a fee. Similarly, for a fee, it undertakes the preparation of the annual accounts and tax obligations towards the tax authorities. In this respect, the plaintiff is active as an operational holding, which deducts input VAT on input supplies which arise in connection with the administration services it provides. In addition, it provides unpaid benefits in kind as its shareholder contribution. Whether the operational holding is also entitled to deduct input VAT in this respect is disputed.

The Lower Tax Court affirmed this. The provision of benefits in kind as a shareholder contribution is part of the commercial activity of the active shareholding administration. This does not constitute an

Contacts

KPMG AG
Wirtschaftsprüfungsgesellschaft

Head of Indirect Tax Services
Dr. Stefan Böhler
Stuttgart
T +49 711 9060-41184
sboehler@kpmg.com

Berlin
Martin Schmitz
T + 49 30 2068-4461
martinschmitz@kpmg.com

Duesseldorf
Peter Rauß
T +49 211 475-7363
prauss@kpmg.com

Ursula Slapio
T +49 211 475-8355
uslapio@kpmg.com

Frankfurt/Main
Prof. Dr. Gerhard Janott
T +49 69 9587-3330
gjanott@kpmg.com

Wendy Rodewald
T +49 69 9587-3011
wrodewald@kpmg.com

Nancy Schanda
T +49 69 9587-2330
nschanda@kpmg.com

Dr. Karsten Schuck
T +49 69 9587-2819
kschuck@kpmg.com

Hamburg
Gregor Dziejek
T +49 40 32015-5843
gdziejek@kpmg.com

Gabriel Kurt*
T +49 40 32015-4030
gkurt@kpmg.com

Antje Müller
T +49 40 32015-5792
amueller@kpmg.com

Cologne
Peter Schalk
T +49 221 2073-1844
pschalk@kpmg.com

Leipzig
Christian Wotjak
T +49 341-5660-701
cwotjak@kpmg.com

Munich
Dr. Erik Birkedal
T +49 89 9282-1470
ebirkedal@kpmg.com

Kathrin Feil
T +49 89 9282-1555
kfeil@kpmg.com

Claudia Hillek
T +49 89 9282-1528
chillek@kpmg.com

Nuremberg
Dr. Oliver Buttenhauser
T +49 911 5973-3176
obuttenhauser@kpmg.com

Stuttgart
Dr. Stefan Böhler
T +49 711 9060-41184
sboehler@kpmg.com

International Network of KPMG

If you would like to know more about international VAT issues please visit our homepage KPMG International**. Further on this website you can subscribe to TaxNewsFlash Indirect Tax and TaxNewsFlash Trade & Customs which contain news from all over the world on these topics. We would be glad to assist you in collaboration with our KPMG network in your worldwide VAT activities.

Our homepage / LinkedIn

You can also get up-to-date information via our homepage and our LinkedIn account Indirect Tax Services.

* Trade & Customs

** Please note that KPMG International does not provide any client services.

Impressum

Issuer

KPMG AG
Wirtschaftsprüfungsgesellschaft
THE SQUAIRE, Am Flughafen
60549 Frankfurt/Main

Editor

Ursula Slapio (Responsible*)**
T +49 211 475-8355
uslapio@kpmg.com

Christoph Jünger
T + 49 69 9587-2036
cjuenger@kpmg.com

VAT Newsletter and Customs & Trade News – Free Subscription

To subscribe, please register here (VAT Newsletter) and there (Customs & Trade News).

*** Responsible according to German Law (§ 7 (2) Berliner PresseG)



www.kpmg.de

www.kpmg.de/socialmedia



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. Our services are provided subject to our verification whether a provision of the specific services is permissible in the individual case.

© 2019 KPMG AG Wirtschaftsprüfungsgesellschaft, a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved. The KPMG name and logo are registered trademarks of KPMG International.